Supreme Court, U.S.
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No. 99-2011

In The

Supreme Court of the United States

JAMES R. SABOFF and KATHY R. SABOFF,

Petitioners,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals correctly interpreted Florida preclusion law?

2. Whether the Eleventh Circuit Court of Appeals correctly held the Petitioners failed to make a *Jennings* reservation in state court?

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OPINIONS AND ORDERS BELOW

The opinion of the Eleventh Circuit Court of Appeals (Pet. App. A-1) is reported at 200 F.2d 1356 (11th Cir. 2000). The unpublished opinion of the United States District Court, Middle District of Florida, is reproduced as Appendix D of the petition for writ of certiorari.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on January 18, 2000. Rehearing and Rehearing En Banc was denied on March 20, 2000. The petition for a writ of certiorari was filed on June 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 1738

STATEMENT OF THE CASE

The St. Johns River Water Management District (the "District") incorporates by reference the procedural background and statement of the facts in the opinion of the Eleventh Circuit. (Pet. App. A-2, A-3).

The following misstatements of facts in the petition are addressed below:

Footnote 1 of the petition (Pet. 3) is inaccurate. The undisputed evidence established that the pre-existing subdivision building setback covered the same 0.4 acre portion of Petitioners' lot as the later imposed District mitigation area (Pet. App. A-3) except that the mitigation area encompassed an additional 96 square feet more of buildable area than was already precluded by the pre-existing setback.

The statement that the District Riparian Habitat Zone rule "restricted the total use of the lot" is inaccurate. (Pet. 3). The rule required a District permit for Petitioners' activities (which Petitioners received) for the construction of their home, swimming pool and associated clearing on their residential lot. (Pet. 3; Pet. App. A-4).

The statement that the Partial Settlement Agreement "dismissed the injunctive relief, deleted all federal claims, and remanded the action back to the state court" is inaccurate. (Pet. 4). The federal suit against the District was remanded to state court solely because Petitioners unilaterally and voluntarily deleted their federal claims to eliminate federal jurisdiction. (Pet. App. A-2). There was absolutely no evidence presented in any court proceeding below of any agreement of any nature between the District and Petitioners regarding the deletion of any federal claims, a remand, claim-splitting or a *Jennings* reservation.

The asserted verbatim quotation that the agreement was in "no way a 'consent to or waiver of defenses complained in any proceeding' " is an inaccurate quotation. (Pet. 4). The verbatim language of the agreement is that it shall not be interpreted: "in any way to be a

consent to or a *waiver of defenses to any matters complained of in any proceeding by Saboff.*" (emphasis added) (Pet. App. E-3). The District was the defendant asserting defenses to matters complained of by Petitioners. There is nothing in the agreement which constituted a *Jennings* reservation.

The statement that the state court final order of May 11, 1995 dismissed Petitioners' inverse condemnation claim because Petitioners could not "allege a deprivation of substantially all reasonable economical use of the property" is only partially accurate. (Pet. 5). The final order also held the "[f]ailure to allege and prove deprivation of all or substantially all of economically viable use of the property is fatal to an inverse condemnation claim which is not based upon a physical intrusion."

The statement that the District's appraiser at trial agreed that the imposition of the RHPZ over the lot "had a significant impact on the value" is patently false. (Pet. 6).

The last sentence of Petitioners' statement is not factual but argument. (Pet. 6).

The following material facts are not contained in Petitioners' statement of the case:

1. The Partial Settlement Agreement was a record document solely in the administrative proceeding and was never a part of the record of the state court suit. (Pet. App. A-8).

2. Petitioners never made an oral or written *Jennings* reservation in the record of the state circuit court suit.

3. The District's mitigation requirement of a deed restriction or conservation easement did not authorize or allow any public or District access or use of the mitigation area on the property without Petitioners' permission.

4. The Eleventh Circuit opinion addressed only the District's res judicata grounds for reversal and consequently the court did not address the merits of the District's other substantive grounds for reversal briefed before the court. (Pet. App. A-5).

ARGUMENT

The Eleventh Circuit decision correctly follows this Court's decisions of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) and *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). The decision does not conflict with the decisions of this Court, any other court of appeals, or any state court of last resort. The decision does not decide an important question of federal law that has not been, but should be, settled by this Court. Therefore, the petition for a writ of certiorari should be denied.

I.

Whether The Eleventh Circuit Correctly Interpreted Florida Preclusion Law[1]

Petitioners' opening ground for granting certiorari (Pet. 7) argues a question not presented to the Court in the petition. (Pet. i). Whether the elements of an as-applied regulatory inverse condemnation claim under Florida law and under federal law are sufficiently similar for purposes of applying Florida preclusion law is not presented in the petition as a question for the Court. Therefore, this question is not properly before the Court. Sup. Ct. R. 14.1(a) (only questions set out in the petition, or fairly included therein, will be considered). Significantly, whether the Eleventh Circuit correctly construed Florida preclusion law does not present a question of federal law under Supreme Court Rule 10, but rather is reargument of the merits of the case. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 532 67 L.Ed. 922 (1923) (the jurisdiction of the Supreme Court by way of certiorari was not conferred merely to give the defeated party in the Circuit Court another hearing).

The Constitution's Full Faith and Credit Clause[2] is implemented by the Full Faith and Credit statute, 28

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[1] The arguments in the petition do not correlate to the questions presented. Accordingly, the District has rephrased the questions to correspond to the actual arguments made in the petition.

[2] "Full Faith and Credit shall be given in each State to the public Act, Records, and Judicial Proceedings of every other State. And Congress may by general Laws prescribe the Manner in which such Acts, records and proceedings shall be proved, and the Effects thereof." U.S. Const., Art. IV, § 1.

U.S.C. § 1738, enacted just after ratification of the Constitution. The statute provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

To protect the notions of comity, finality, consistent decisions, the prevention of vexatious litigation, and to conserve judicial resources, this statute "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S.Ct. 892, 898, 79 L.Ed.2d 56 (1984). Consequently, a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment is rendered. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Migra, supra* (42 U.S.C. § 1983 does not overrule state preclusion law).

Under Florida law, res judicata bars a second suit when a court of competent jurisdiction has entered final judgment in an earlier suit and the following four factors are met: (1) identity of the cause of action, (2) identity of the thing sued for, (3) identity of the parties, and (4) identity of the quality in the person for or against whom the claim is made. *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992); *Aquatherm Industries, Inc. v. Florida*

Power & Light Co., 84 F.3d 1388 (11th Cir. 1996). Petitioners erroneously assert the Eleventh Circuit misconstrued Florida law regarding the first two factors. The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions. *Albrecht, supra; Hay v. Salisbury,* 109 So. 617, 92 Fla. 446 (Fla. 1926); *Gordon v. Gordon,* 59 So.2d 40 (Fla. 1952); *City of Miami Beach v. Prevatt,* 97 So.2d 473 (Fla. 1957). Thus, under Florida's preclusion law, when a final judgment is rendered between the same parties involving a particular factual transaction or occurrence, that judgment is absolute to those claims actually raised and litigated as well as to those which could have been litigated but were not raised by the plaintiff. *Albrecht, supra; Fields; supra.* Petitioners prior state court as-applied regulatory inverse condemnation suit arose from the identical factual occurrence as the as-applied regulatory inverse condemnation suit later brought in federal district court. Therefore, the court of appeals correctly concluded that under Florida law the cause of actions were identical.

Under Florida law, the "identity of the thing sued for" is the type of relief sought. *Lake Region Hotel Co. v. Gollick,* 149 So. 205, 111 Fla. 64 (Fla. 1933); *Smith v. Pattishall,* 176 So. 568, 127 Fla. 474 (Fla. 1937); *Donahue v. Davis,* 68 So.2d 163 (Fla. 1953). Petitioners' inverse condemnation suits in both the state court and the federal district court sought the identical relief of just compensation. Consequently, the court of appeals correctly determined the "identity of the thing sued for" was satisfied. *Fields v. Sarasota Manatee Airport Authority,* 755 F.Supp. 377, 379 (M.D. Fla. 1991), *approved,* 953 F.2d 1299 (11th Cir.

1992) (identity of thing sued for was met where the remedy of just compensation sought in Florida state court was the same in federal court). Petitioners' reliance on the intermediate appellate decision of *Seaboard Coast Line Railroad Co. v. Industrial Contracting Co., Inc.*, 260 So.2d 860 (Fla. 2d Dist.Ct.App. 1972) is inapposite. In that case there was no "identity of the thing sued for" because the first suit was an action in tort for damages while the second suit was an action in contract for indemnification.

Therefore, the Eleventh Circuit correctly applied Florida preclusion law regarding "identity of the cause of action" and "identity of the thing sued for." Petitioners' challenge to the state law determinations by the Eleventh Circuit skilled in the law of the states of its jurisdiction should rarely constitute an appropriate subject for this Court's review unless its conclusions are shown to be unreasonable. *Propper v. Clark*, 337 U.S. 472, 486, 93 S.Ct. 1333, 1342, 69 L.Ed. 1480 (1949); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 224 n. 10, 106 S.Ct. 507, 513 n. 10, 88 L.Ed.2d 523 (1985); *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 916, 117 S.Ct. 282, 284, 136 L.Ed.2d 210 (mem.) (1996) (REHNQUIST, C.J. joined by BREYER, J., dissenting) (the Court's function, generally speaking, is not to correct federal court's misapplication of state law, except perhaps, in exceptional cases with importance beyond the parties' particular dispute). Petitioners have failed to make such showing.

The standard of proof of an as-applied regulatory takings claim under the Fifth Amendment is indistinguishable from the standard under Florida law. Art. X,

§ 6, Fla. Const.[3]; *Treister v. City of Miami*, 893 F.Supp. 1057, 1067 (S.D. Fla. 1992) (Florida regulatory takings law is sufficiently identical to federal regulatory takings law for res judicata). The petition does not identify a single Florida judicial decision which differs from federal law regarding the standard of proof of an as-applied regulatory takings claim. The premise of Petitioners' argument is that Florida law does not recognize a federal partial takings claim which Petitioners proffer as "where a regulation deprives the owner of a substantial part, but not necessarily all of the economical use or value of the property." (Pet. 13). Yet the state circuit court ruled that Petitioners had to plead and prove that they had been denied "all or substantially all economically viable use" of their lot. Thus, the federal partial takings standard proffered by Petitioners is identical to the standard of the state court judgment. Indeed, the state court judgment was squarely supported by Florida law which requires a plaintiff to prove a deprivation of "all or substantially all economic use" of the property to establish an as-applied regulatory takings. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994) (a taking occurs when a regulation denies substantially all economically beneficial or productive use of the land); *Taylor v. Village of North Palm Beach*, 659 So.2d 1167, 1170 (Fla. 4th Dist.Ct.App. 1995) (deprivation of all or substantially all economic, beneficial or productive use of the

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[3] "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . "

property); *accord, City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1385 (Fla. 4th Dist.Ct.App. 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2583, 132 L.Ed.2d 832 (1995); *Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So.2d 761, 764 (Fla. 2d Dist.Ct.App. 1994), *rev. denied*, 645 So.2d 452 (Fla. 1994); *State Dep't of Environmental Protection v. Burgess*, 667 So.2d 267, 270 (Fla. 1st Dist.Ct.App. 1995); *Martin County v. Section 28 Partnership, Ltd.*, 676 So.2d 532, 537 (Fla. 4th Dist.Ct.App. 1996), *rev. denied*, 686 So.2d 581 (Fla. 1996), *cert. denied*, 520 U.S. 1196, 117 S.Ct. 1553, 137 L.Ed.2d 701 (1997); *Treister, supra*, 893 F.Supp. at 1068 (Florida courts regularly refer to federal case law in discussing the regulatory takings standard under Florida law).

The Eleventh Circuit standard matches Florida's standard. *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992), *supplemented*, 978 F.3d 1212 (11th Cir. 1992) (denial of all or substantially all economically viable use of his property); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir. 1996), *cert. denied*, 522 U.S. 981, 118 S.Ct. 441, 139 L.Ed.2d 378 (1997) (deprivation of all or substantially all viable use of the property).

Consequently, Petitioners' argument collapses upon a defective premise. There being no distinction between federal and Florida law governing the standard of proof of a regulatory inverse condemnation claim, the Eleventh Circuit correctly interpreted and applied Florida preclusion law. The petition should therefore be denied.

II.

Whether The Eleventh Circuit Correctly Held The Petitioners Failed to Make a *Jennings* Reservation In State Court

Petitioners do not present a question of federal law under Supreme Court Rule 10, but again reargue the merits of the case. Petitioners principally ask this Court to re-evaluate whether the Eleventh Circuit correctly determined the Petitioners failed to make a *Jennings* reservation on the record of the state circuit court proceeding. (Pet. App. A-7, A-8); Sup. Ct. R. 10 (a petition for writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law). Further, Petitioners expend considerable energy misrepresenting a Partial Settlement Agreement (Pet. App. E-1) executed in an administrative proceeding. Petitioners' post hoc characterizations of the agreement as a *Jennings* reservation are wholly unsupported by any evidence and these same assertions were unequivocally rejected by the Eleventh Circuit. (Pet. App. A-7, A-8). It was undisputed the agreement was never on the record or in the filings of the state court suit. It was executed for purposes of the administrative proceeding so Petitioners could commence construction of their home and other improvements while the administrative proceeding was pending. (Pet. App. A-4). Petitioners' statements regarding asserted tacit agreements, understandings or implied consent with or by the District are not based in fact in the record below. There was no evidence presented in any court proceeding below of any agreement of any nature

between the District and Petitioners regarding the deletion of any federal claims, a remand, claim-splitting or a *Jennings* reservation.

The ripeness of Petitioners' later federal takings claim was never at issue in this case. Petitioners received from the District a final permit approval for the construction of their home and swimming pool and Petitioners did not receive any compensation by the Florida courts for their alleged takings claim as a result of that permit approval. (Pet. App. A-2, A-5). The claim would not have been barred had Petitioners simply invoked Eleventh Circuit precedence and made a formal reservation on the record of the state court suit preserving the right to later litigate the takings claim in federal court.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court required potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation prior to bringing suit in federal court for a takings claim. State courts, like federal courts, have concurrent authority to resolve federal constitutional questions and uphold federal law. *Stone v. Powell*, 428 U.S. 465, 493 n. 35, 96 S.Ct. 3037, 3052 n. 35, 49 L.Ed.2d 1067 (1976); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (state courts have concurrent jurisdiction over § 1983 actions); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (interpretation of federal law is the proprietary concern of state, as well as federal, courts). Consequently, the doctrine of res judicata and 28 U.S.C. § 1738 preclude a plaintiff from pursuing in federal court a claim previously litigated, or which could

have been litigated, in state court. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (pertinent state law res judicata principles bar a later 42 U.S.C. § 1983 suit in federal court where a plaintiff filed the state-court action and could have raised the federal claims in the state-court suit).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit addressed the tension between *Williamson's* just compensation ripeness requirement and the principles of res judicata imbued in 28 U.S.C. § 1738. Relying upon *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed.2d 180 (1976), and *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the Eleventh Circuit sensibly reconciled *Williamson* with res judicata by allowing a federal takings plaintiff, involuntarily in state court pursuant to *Williamson*, to reserve a later federal takings claim by making a formal reservation of such claim on the record in the state court suit. To avoid res judicata, a takings plaintiff may either litigate both federal and state takings claims in state court or make a formal reservation in the state court proceedings of the intent to bring a federal takings claim in a federal court should the state court, applying state law, find adversely to the plaintiff. *Fields, supra*, 953 F.2d at 1305, 1309 n. 10. In the case at bar, the Eleventh Circuit determined that Petitioners simply failed to make the requisite reservation on the record of the state circuit court and therefore res judicata applied to their takings claim. (Pet. App. A-7).

The very purpose of a *Fields* reservation, like an *England* reservation, is to remove the adjudication of the

federal constitutional claim from state court by formally advising the state court on the record. Of course, this requirement cannot be satisfied by an out-of-court settlement agreement filed in a distinctly separate administrative forum having no jurisdiction over constitutional issues. *Department of Revenue v. Young American Builders*, 330 So.2d 864 (Fla. 1976) (Fourteenth Amendment issues may not be determined in an administrative proceeding); *Ortega v. State Dept. of Environmental Protection*, 646 So.2d 797 (Fla. 1st Dist.Ct.App. 1994) (state agency cannot adjudicate a takings claim). The Eleventh Circuit flatly rejected the argument now advanced that any out-of-court and off-the-record administrative proceeding agreement was the equivalent of a formal and clear on-the-record reservation in state court as required by *Jennings* and *Fields*. (Pet. App. A-7, A-8). *See Holmes v. Jones*, 738 F.2d 711 (5th Cir. 1984) (verbal statement at an administrative hearing that plaintiff "was reserving and preserving the right to challenge any statutory or constitutional violations" was not a *Jennings* reservation before state court). Moreover, even if the administrative agreement had been part of the state court record, it did not "set forth clearly" a *Jennings* reservation. (Pet. App. A-7).

The decision of *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) is entirely consistent with the Eleventh Circuit decision in the case at bar. In *Dodd*, ripeness under *Williamson's* just compensation prong, rather than res judicata, was at issue. The question before the court was whether *Williamson* required the plaintiffs to pursue their Fifth Amendment takings claims in state court before seeking relief in federal court. *Dodd, supra*, 59 F.3d at 869. The court held that the failure of plaintiffs to raise a federal takings claim in state court did not preclude them

from bringing a later federal takings claim in federal court because the plaintiffs had made an express reservation before the state courts and the state had consented to claim-splitting. Cf. *Springer v. City of Bend*, 1995 WL 502882 (9th Cir. Sept. 14, 1995) (unpublished), *cert. denied*, 517 U.S. 1209, 116 S.Ct. 1826, 134 L.Ed.2d 931 (1996) (federal takings claim was barred by prior state law takings claim where there was no reservation or claim-splitting). The *Dodd* plaintiffs, unlike Petitioners in this case, "expressly reserve[d] their right to have their federal claims adjudicated in federal court" before the administrative state agency, which could adjudicate a takings claim, *Dodd, supra*, 59 F.3d at 857, and the state appellate courts. *Dodd, supra*, 59 F.3d at 857, 862. Additionally, the state in *Dodd* consented to claim-splitting of the simultaneously pending state and federal takings suits, while in the instant case, there was never simultaneously pending federal and state takings suit in which to consent to claim-splitting. Importantly, the Ninth Circuit Court has expressly acknowledged that a potential federal takings plaintiff may preserve such claim by making a reservation in state court consistent with the *Fields* decision. *Macri v. King County*, 126 F.3d 1125, 1130 n. 7 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153, 118 S.Ct. 1178, 140 L.Ed.2d 186 (1998) (a court can reserve a federal takings issue so that issue will not be precluded from further litigation).

The *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), referenced by Petitioners (Pet. 6, 7), is foreign to the facts and issue in the instant case. Res judicata was not at issue in *Del Monte Dunes*.

The reservation exception that Petitioners failed to invoke was expressly fashioned by the Eleventh Circuit for the benefit of landowners like Petitioners who wish to avoid preclusion and preserve their later federal takings claims while complying with *Williamson's* just compensation ripeness requirement. The reservation exception has been endorsed by the other circuit courts appeals and rejected by none. *Macri, supra; Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, Virginia,* 135 F.3d 275, 283 (4th Cir. 1998); *Slyman v. City of Willoughby, Ohio,* 1998 WL 24990 (6th Cir. Jan. 16, 1998) (unpublished); *John Corp. v. City of Houston,* 2000 WL 758347, n. 13 (5th Cir. June 12, 2000). The Eleventh Circuit provided Petitioners with a distinct map to avoid the purported procedural "mine field" (Pet. 23) about which Petitioners now complain. Petitioners simply failed to read the map.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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